

**Testimony by Janice Heggie Margolis  
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**HB 6700**

**“An Act Concerning the Dram Shop”**

**Members of the Judicial Committee  
April 15, 2013**

Good Afternoon. My name is Janice Heggie Margolis and I am the Executive Director of Mothers Against Drunk Driving in Connecticut. Thank you for holding this Judiciary Public Hearing. I appreciate the opportunity to testify before you and I hope together we can pass sound legislation that will protect all victims of alcohol-related crashes who might gain protection under the Dram Shop Amendment before you.

I have come before this committee today to endorse raised HB 6700, An Act Concerning the Dram Shop Act. A simple amendment changing language to “intoxication” from “visible intoxication”, would allow bars and servers to be held accountable for serving an intoxicated patron who then drives drunk and kills or injures an innocent victim. MADD CT submitted an Amicus Brief to the Connecticut Supreme Court highlighting scientific data showing that a BAC (Blood Alcohol Content) sufficient to significantly impair driving ability in nearly everyone is insufficient to produce signs in most people. Thus, the outward appearance is simply not the most reliable indicator of whether someone is intoxicated in the sense of unsafe to drive a motor vehicle.

MADD CT respectfully requests strengthening the current Dram Shop statute by replacing the “visible intoxication” wording to “intoxication”.

Thank you.

*O'Dell v. Kozee* is a pending Connecticut Supreme Court case with significant implications for the rights of DUI victims in our state. The case focuses on a provision of state law known as the Dram Shop Act. This law allows someone who has been injured by a drunk driver to recover up to \$250,000 in damages from any establishment that served the driver when he or she was already intoxicated. The question posed by the case is whether plaintiffs in dram shop actions have to prove that the driver was *visibly* intoxicated at the time of service. MADD CT filed an amicus curiae (friend of the court) brief with the Supreme Court, urging the Court not to interpret "intoxication" as "visible intoxication" for the purposes of the Dram Shop Act.

#### *The case*

Patrick O'Dell was killed in the passenger seat of his friend's car when his friend drove into a parked truck. The men had just left a bar where they had both been drinking for several hours. The driver's BAC was measured at .187 an hour after the crash. O'Dell's father, as administrator of his son's estate, sued the bar. At trial, an expert toxicologist testified that the driver's BAC was in the .19-.23 range when the bar last served him, and that almost anybody with a BAC in that range would be seriously impaired. The jury found the bar liable and awarded the plaintiff \$4 million in damages; the court reduced the amount of the award to \$250,000 – the maximum recovery allowed under Connecticut's Dram Shop Act.

The bar appealed. It argued - based on its reading of a previous decision of the Connecticut Supreme Court - that the trial judge should have required the plaintiff to prove that the driver had been visibly intoxicated when the bar served him. The Appellate Court agreed and reversed the jury's verdict. Mr. O'Dell then appealed to the Connecticut Supreme Court.

#### *MADD's brief*

Alinor Sterling, a MADD board member and attorney, suggested that MADD CT file a brief with the Supreme Court. Attorney David N. Rosen agreed to prepare the brief *pro bono*.

The central theme of our brief was that equating intoxication with visible intoxication sends precisely the wrong message: that it is ok for bars to keep serving patrons steadily for hours, so long as they do not "look" drunk. The brief highlighted scientific data showing that a BAC sufficient to significantly impair driving ability in nearly everyone is insufficient to produce visible signs in most people. Thus, outward appearance is simply not the most reliable indicator of whether someone is intoxicated in the sense of unsafe to drive.

Nor would a visible intoxication rule be consistent with the intent behind Connecticut's particular version of the Dram Shop Act. Most other states do require proof of visible intoxication, since only such proof can establish that the bar was negligent. But Connecticut's law is different. Our legislature specifically adopted a "strict liability" rule for dram shop actions, which means that the plaintiff does not have to prove that the bar was at fault. A bar that serves an intoxicated person may be liable for that person's conduct whether or not the bar knew the person was intoxicated at the time of service.

While strict liability may seem like a harsh rule, our brief explains why it may be sensible. It is often difficult, and sometimes impossible, for the plaintiff to prove what an establishment's employees knew. The bartender or waiter, who may be the only witnesses, can always say, "Everybody I served looked fine to me." A strict liability rule brooks no excuses and leaves no uncertainty: if it turns out that a bar has served somebody who was already drunk, and that person has injured somebody, the bar is on the hook. The bars and their insurance carriers thus have an incentive to exercise extraordinary vigilance in preventing bar employees from over-serving customers.

Moreover, Connecticut's strict liability rule is part of a careful balance struck by the legislature. While the legislature relieved plaintiffs of the burden of proving that the bar was at fault, it also limited bars' liability by capping plaintiffs' damages at just \$250,000. By contrast, other states allow unlimited recovery for successful plaintiffs in dram shop actions, where damages can run into the millions.

Our brief argued that a visible intoxication requirement would effectively undo the strict liability rule adopted by the Connecticut legislature and upset the balance struck by our Dram Shop Act. The consequences would be two-fold. First, since plaintiffs would bear the burden of proving not only intoxication but visible intoxication, dram shop act litigation would be more expensive and more uncertain. Second, the uncertainty surrounding bars' liability would diminish the deterrent effect that the strict liability rule was designed to achieve – leading bars to take more risks in serving patrons who may be close to or over the line. For these reasons, MADD CT urged the Supreme Court to reject the visible intoxication rule.

The Supreme Court heard oral arguments in the case in March but has not yet issued its decision.